Supreme Court, U.S.
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No. 00-278

In The

Supreme Court of the United States

JANET CHANG,

Petitioner,

vs.

FIRST AMERICAN TITLE INSURANCE CO. OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of State Of New York Appellate Division, Second Dept.

REPLY TO BRIEF IN OPPOSITION

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I. U.S. SUPREME COURT HAS JURISDICITON

Contrary to FATIC's assertion, the district court's part in the foreclosure sale of the property was not mere acquiescence in a private action. The court had taken affirmative action to make it possible for the FATIC to foreclose and the court appointed a referee to conduct the sale. "Judicial action in private disputes is a form of state action required for application of this clause prohibiting state from denial of equal protection of its law to any person. *Hosey v. Club Van Cortlandt,* DCNY 1969, 299 F. Supp. 501; See also *Edward v. Habib,* 397 F.2d 687, cert. denied, 89 S. Ct. 618.

28 USCA Judiciary and Judicial procedure Sec. 1257, commentary on 1988 revision by David D. Siegel stated "Note that the section allows certiorari to review not just a decision of the highest court of the state, but of the highest state court 'in which a decision could be had'. That language, contained in the old section and repeated in the new, takes note of the internal strictures a state may impose on appeals within its own court system, perhaps stopping a case at some lower level and barring it from review by the state's highest court, for that matter, from any appellate court at all. If that case nevertheless poses a federal question, review of it can be applied for to the U.S. Supreme Court – solely by Certiorari route, of course – from whatever court it has been able to reach within the state system." The "time period" was the requirement I did not meet, the case would not be appealable under state law within the State Court system; it can still reach the highest court in the land through the good office of Sec. 1257. (See *Grovey v. Townsend,* 55 S. Ct. 622).

Liberty to manage one's own affairs as one chooses and freedom from invasion of one's contractual rights, and property rights are protected by constitution. Both rights were invaded and abridged, which raises a federal question. In reviewing the case, the Court could resolve the conflict of opinion between the Queens district court's ruling and the opinion of *Universal Title Ins. Co.*, 942 F.2d 1311 and *Coy v. Raabe*, 418 P.2d 728, on the question of whether a "mistake" by professionals like bankers or title insurers should permit them to claim the right of subrogation. Especially a title insurer for the purpose of subrogation. *Universal* and *Raabe* Courts stated that they should be subject to liability for breach of a legal duty while the Queens court in our case would excuse the mistake and permit subrogation rights. A definitive ruling on these questions related to subrogation rights in general and that of a title insurer in particular would serve public interest.

II: DUE PROCESS AND EQUAL PROTECTION

"The right to make contracts about one's affairs is a part of the liberty protected by the due process clause." See *Morehead v. Tipaldo*, 298 U.S. 587. The interference into my existing mortgage right did destroy my privilege to pay it off in small monthly installments and the over-encumbrance of the entire property had led to the loss of my old age retirement home. The delinquent title insurer took $386,246 from the proceeds of the sale, making a profit of nearly $190,000. FATIC is continuing to extort an additional $12,576 – half of the funds in the receiver's hand, in spite of the fact that the Referee's report stated

no deficiency and FATIC did not comply with the judgement order to file for deficiency proceeding within the allowed time. The so-called surplus money of $169,000 left for Petitioner after paying taxes and legal debts would not even be enough to buy a one bedroom condo in Forest Hills.

If equal protection means that all persons receive the same treatment, then let me ask, were all parties in our case treated alike?

a) consider the desire of both co-tenants of equal share in a property to be of equal importance, so as not to allow one's desire to diminish the rights of the other? The case of *First American Title Ins. Co. of N.Y. v. Kevlin*, 610 NYS 2d 361 demonstrated that when two cotenants were extended equal protection, the non-consenting one was not penalized for the other's fault. I was not protected when the court struck down my defense and counterclaim where ample documents were offered to prove that the lender assumed the risk with knowledge when it could bypass a danger and chose a safer alternative by walking away from Steven.

b) consider the arguments of both plaintiff and defendant to be equally credible and worth investigation in a trial to determine the equities, faults and liability of all? Summary Judgement for the plaintiff was not the proper device to allow full and fair opportunity to defend my property and contractual rights. In the *Kevlin* case the summary judgement was only against the borrower.

c) consider the inequality of the knowledge, skills and financial resources between a large

law firm (with specialized experts, super research facility and staff backed by rich title insurer's money) and a frightened pro se lay litigant?

d) The Ninth Amendment makes it possible to include some rights when it is considered basic and deserving of protection even if it was not enumerated in the Constitution. It is good public policy to establish affirmative action where a disadvantaged defendant's fundamental rights were threatened and the lack of money to obtain counsel would work injustice. New protective devices had appeared when needs arose, new rights for court appointed counsel for defendant in criminal case eventually became a reality.

I did everything I could to assert a claim against FATIC after I had to continue pro se. But my effort was so ineffective that the court could not see the injustice in allowing FATIC to receive a windfall. "The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law"; a layman "lacks the skills and knowledge to prepare his defense, even though he had a perfect one. He requires a guiding hand of counsel every step of the way" as stated in *Powell v. Alabama*, 287 U.S. 45 at 68-69. It would be too big a strain on the State's purse to appoint counsel for all poor defendants in civil cases. But in the case of foreclosure (with irreversible harm) where the unfair advantage of big money like insurer can overwhelm a poor individual, resulting in unjust and catastrophic outcome, it is not too much to request effective protection.

III. ON SUBROGATION

The object of Subrogation is to serve justice. This right adapts all the maxim of Equity: superior equity, free from fault, and requiring fair result. It applies where dictated by equity, justice, and good conscience as well as by public policy (See 83 CJS Subrogation Sec. 6.)

In citing Herfferman, Equitable Subrogation, FATIC neglected to note that the determining factor is the phrase "when the circumstances are appropriate". The cases cited in the opposition brief were distinguished from our case as their "circumstances" were quite "appropriate," and there was no interference with a third party existing contract or slandering of her property title. Here, FATIC chose again to ignore the clause "circumstances" in Restatement, Restitution Sec. 162 Comment (b),

> "b. **Circumstances** giving rise to subrogation. Where a person discharges an obligation owed by another, or a lien upon the property of another, and does so officiously, he is not entitled to reimbursement from the other (see Sec. 2), and is not entitled to be subrogated to the position of the obligee or lien-holder. In such a case it is true that as a result of the payor's act the other is enriched, but the enrichment is not unjust. . . . "

Restatement, Restitution Sec. 2 states that a person who officiously confers a benefit upon another is not entitled to restitution therefor. The rule has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them.

I objected perhaps too much in my Petition against GEB/FATIC in their claiming to be subrogated. GEB became an intermeddler through its reliance on FATIC's faulty certification. GEB had willingly paid the whole amount when the mortgage was allowed until year 2007 to be paid up and there was no notice or even indication of default. The discharge of my mortgage debt was objected by me and the property was under no threat; nevertheless, GEB destroyed the security by which a widow and 3 orphans could preserve their property rights. It was a tortious intrusion.

"Party may under NY Law, be subrogated to claim of another only when it pays the other's debt under compulsion or for protection of some interest of party making payment." *MacMilliam Inc. v. Fed. Ins. Co.*, 741 F. Supp 1079. See also *In re Standardo*, 991 F.2d 1089. Circumstances allowed such rights were only when payment was in response to actual threat, as out of obligation, not of voluntary good will. *Weir v. Fed. Ins.*, 811 F.2d 1387. The rights are not for an intruder, as in *Mort v. U.S.*, 86 F.3d 890, *Qualicare-Walsh v. Ward*, 947 F.2d 823.

Please refer to *Universal Title Ins. Co.*, 942 F.2d 1311 and *Coy v. Raabe*, 418 P.2d 728; in my petition brief (on Page 19) I quoted the objection of two courts to the title insurer's claim to subrogation right. They consider it to be a gross misapplication of the doctrine to allow title insurer to automatically settle into it, because title insurance is a commercial transaction involving consideration and the title insurer's relationship is governed by contracts. The Universal Court also pointed out that "it is difficult to think of a situation in which a title insurance

company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence. Either they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation." In *Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764 the court held "Usually the very purpose and essence of the title insurance transaction is to obtain a professional title search, opinion and guarantee. The policy of title insurance is in the nature of a Warranty." Competency of performance is an important element of a service undertaken.

FATIC must be aware of its problem so that it tried to use the words "purchase" and "assignment". Why FATIC would not do for me what it did for Mrs. Kevlin in *First American Title Insurance Co. of N.Y. v. Kevlin*, 610 NYS 2d 361, where FATIC severed its claim against a non-consenting co-tenant, a summary judgement for foreclosure sale was allowed against only her co-tenant.

There are authorities stating that FATIC could not escape liability by making its payment on policy to be an assignment, my early brief (on Page 26 and 27) cited 78 NY Jur.2d, Mortgage. Sec. 325 on the "assignment". In addition, please note the following federal opinion and the opinion from other state courts.

As stated by the court in *Meyer v. Bank of America Nat. Trust & Savings Ass'n*, 77 F.2d at 1085, an assignment of an assignable cause of action is a form of "subrogation" and neither a written or oral contract is necessary to effect transfer of such rights and formal written assignment of claims adds nothing to the enforceability of cause of action by assignee; an assignee's cause of action is subject

to the same defense as though no assignment thereof had been made; the court, citing ". . . . in *60 C. J.*, p. 749, with reference thereto should be noted, to-wit: 'While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is entitled to be subrogated, the completion of the surety's subrogation, and his right to pursue the rights and remedies of the creditor, is not dependent on the willingness of the latter to make an assignment . . . if the surety is not entitled to subrogation, an assignment by the creditor will be ineffectual to give surety a right to subrogation he would not otherwise have.' " The court also referred to *American Surety Co. of N.Y. v. Lewis State Bank*, 58 F.2d 560 and *American Bonding Co. of Baltimore v. State Savings Bank*, 133 P.367 as illustration. If insurers have no right to subrogate, their position is not improved by the assignment to them of the insured's claim. Any right of recovery against third parties for money paid by insurers under the contracts must rest solely upon a weighing of the equities as between the third parties and insurers. Such equity generally depends upon participation in the original wrong. (*American Surety Co. v. Bank of California*, 133 F.2d 160.)

CONCLUSION

This case presents serious issues affecting many home and property owners as well as litigators. Petitioner respectfully requests this court grant Certiorari to review the issues.

Respectfully submitted,

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